IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 520.

ALLEN POPE, *Pro se*,

Petitioner,

v.

THE UNITED STATES,

Respondent.

BRIEF FOR PETITIONER.

On Petition for Rehearing of Petition for Writ of Certiorari to the Court of Claims.

Now comes petitioner for himself and respectfully represents:

The lower court, under the mandate of December 5, 1944, erred:

(1) Where a quorum of four judges was present at the trial of the case and a fifth judge (Judge Marvin Jones), who was not present, sat in decision providing concurrence of three judges necessary to the decision of the major issue in suit and two judges who were present dissented.

Prior to June 23, 1874, the Court of Claims consisted of five judges, two judges constituted a quorum and there was no provision for concurrence. On that date, there was enacted and approved 18 Stat., Chap. 468, providing:

> That any three judges of the Court of Claims shall constitute a quorum; *Provided*, that the concurrence of

three judges shall be necessary to the decision of any case.

This provision remains in the United States Code as it presently exists § 243, ante p. 4:

> "When two or more are to hear and determine, they must sit together, not separately." Stroud's Judicial Dictionary, p. 857. "A General Treatise on Statutes," Dwarris, Second Edition, 1848 (In Library of Congress) p. 670, Latin American editions, p. 276.

(2) Where under the same circumstances, the disputed issue was a point of law, i.e., the interpretation of a Special Act of Congress as to whether said Act provides for payment of excavation of caved-in materials as a separate item of claim at the prior contract rate for excavation.

This case was before the lower court or remand. The particular point of law was considered by this Court, the lower court reversed, with order to render judgment accordingly, this Court having ruled that the Special Act had created a new liability of the government, ante p. 11. While ordinarily nothing was before the lower court except what was remanded. (*In re Potts, Petitioner*, 166 U. S. 263, 265, 267; *The Eastern Cherokees* v. *The United States*, 45 Ct. Cls. 104, 131; *Himely* v. *Rose*, 5 Cranch 313, 314, 316; *Martin* v. *Hunter's Lessee*, 1 Wheaton 304, 323, 355; *Sibbald* v. *The United States*, 12 Peters 488, 491), all the more was that the situation where the absentee judge casting the effective vote took no part at all in the previous actions and none on the remand except to adjudge from the written record and statements of judges, but without having heard the parties.

(3) In failing to remand the case for reargument before a full bench.

> *Standard Oil Company of Indiana* v. *The United States*, 78 Ct. Cls. 714.

Recent cases in this Court listed in appendix hereto p. 24-25 thereof.

(4) In failing to certify the distinct question of law necessary to the decision of the case to the Supreme Court under Sec. 3(a) of the Act of February 13, 1925.

Said Sec. 3(a) is the basis of this Court's Rule 40.

The lower court had this case on remand for nearly a year before decision, during which period one of the judges was absent. Evidently the court had sound reasons for not recalling one of the retired judges to admit of reargument before a full bench. In the circumstances, the quorum of four having been equally divided, it is suggested that the duty of the lower court was to have certified the question of law to this court.

REASONS FOR GRANTING REHEARING.

From what has been said generally, having in mind the whole background of the case as epitomized under the subtitle "Summary of Statement", *ante*, p. 5, and by the actual language of the reasons assigned, it would appear that enough has been said for present purpose. Accordingly further statement will be limited to references and citations of authorities under each assigned reason.

(1) The decision of the Court of Claims, in the major item in suit, arrived at only with the concurrence of a judge, who was absent from the trial, is contrary to the United States Code establishing and vesting said Court of Claims.

The court is a legislative court and is bound by the prescriptions of Congress. The United States Code constituting and vesting the Court of Claims Title 28, Chap. 7, §§ 241-293, including provision for rules of practice, § 263, *post*, p. 2, makes mandatory that parties shall have opportunity for full hearing before final judgment.

(2) The said decision thus made is contrary to the Special Act, 56 Stat. 1122, providing jurisdiction and requiring determination and judgment.

The Act confers jurisdiction to hear, determine, and render judgment as described and in the manner set out

in section 2 thereof, and section 2 provides that the Court of Claims is hereby directed to determine and render judgment, etc., etc. (R. 1, or *ante*, p. 2.) It is believed that these provisions require the procedural minima to insure an informed judgment by one who has the responsibility of making final decision and order. *Southern Garment Workers Ass'n* v. *Fleming*, 122 F. 2d 622, 626; 74 App. D. C. 228.

(3) The said decision as made is contrary to the "due process" provisions of the 5th and 14th Amendments to the Constitution.

Petitioner had a Special Act of Congress, considered over a period of years before enactment, with consultation and barter with executive departments, finally limited to four designated items of claim; the same was formally passed and thereupon approved by the President; and, upon proper suit thereon, the said Act was considered, its constitutional validity established by this Court and the Court of Claims ordered to render judgment accordingly.

The fundamental requisite of due process of law is the opportunity to be heard before a final judgment is given. "Constitution of the United States, Revised and Annotated 1938", pp. 654, 890, 899, 905, 906, 907, and cases there cited.

The usual course of law, customary settled usage, should sanction decision, *id.* 884, 906.

"To hear". *Southern Garment Workers Ass'n* v. *Fleming*, 122 F. 2d 622, 626; 74 App. D. C. 228.

(4) The said decision as made is novel procedure in the Court of Claims; never, as far as petitioner is able to discover, having been practiced theretofore.

Petitioner finds few even border-line cases, but none except those of October 1, 1945, now pending, where opportunity was not given to be heard before final judgment as corrected by reargument, e.g., *Standard Oil of Indiana* v. *United States*, 78 Ct. Cls. 714.

No case from the Court of Claims directly on this point has been ruled on by this Court.

(5) The said sort of procedure is novel in any Federal Court, so far as petitioner is able to discover, or in State courts, especially where prescriptions of law control.

Here again there are border-line cases especially in New York State. If the regulations provided by the legislatures are examined, it appears that none is exactly in point. In the case of *Charles Shaw* v. *People*, 3 Hun. 272, one judge in a murder case was absent on Monday, it was held that he was not qualified to participate further.

(6) The Supreme Court, not under law of Congress and when not under the customary rule in cases of tie votes on appeal cases, frequently in the interest of justice sets cases for reargument before a full bench.

For current cases see this Court's list, January 2, 1945, set for reargument before a full bench. Appendix p. 24.

(7) As the decision stands, the affect is that by device of reconstruing an Act of Congress, the lower court by means of the vote of one judge who did not participate in the trial, overturns the decision of the Supreme Court.

(8) The same sort of decision was made below on the same date in three other cases in which further action is now pending turning on the validity of the concurrence of the absentee judge.

See statement ante p. 12-14.

(9) If one absentee judge may sit in effective judgment, why not two absentee judges, three judges constituting a quorum to try the case?

(10) The procedure in said decision is contrary to procedure in prior cases in said court, where, though there was the required quorum of judges who heard the argument, one judge dissented and an absentee judge voted with the majority and was assigned to write the opinion, a reargument was ordered and had.

Standard Oil Co. (Indiana) v. The United States, 78 Ct. Cls. 714.

CONCLUSION.

The judgment below (in effect given by one judge who was not present at the trial) is contrary to fundamental concepts of justice; contrary to the Constitution assuring rights of due process to citizens; contrary to the United States Code providing general jurisdiction to the Court of Claims and for Rules of practice therein; contrary to the Special Jurisdictional Act involved. The issue raised is novel. Pending cases turn upon the principle involved. This point of law, especially from the Court of Claims, has never been ruled on by this Court. The judgment below is final. This Court has jurisdiction if it will accept it. It is respectfully urged that the duty of the Court is to accept it and grant the rehearing requested.

ALLEN POPE, *Pro se*,
Petitioner.